

67239-8

67257-8

No 67239-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD ALLEN DUNN,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2011 DEC 14 PM 4:29

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden

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SUPPLEMENTAL ASSIGNMENT OF ERROR  
AND SUPPORTING ARGUMENT

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**A. SUPPLEMENTAL ASSIGNMENT OF ERROR**

1. The failure to instruct the jury that they need not be unanimous to answer “no” to the special verdict form on the sexual motivation aggravating circumstance denied Dunn his right to a jury trial and due process safeguarded by the Sixth and Fourteenth Amendments.

**B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR**

In Washington, unanimity is required for a jury to answer “yes” to a special verdict, but unanimity is not required for a “no” answer. Instructions that falsely convey that the jury must be unanimous to answer “no” undermine the jury’s deliberative process and require the vacation of a special verdict so obtained. The special verdict forms here affirmatively advised the jury that they had to be unanimous to answer “yes” and, read in conjunction with the other instructions, signaled that unanimity was likewise required for a “no” response. Must the jury’s special verdicts be vacated?

**C. STATEMENT OF THE CASE**

Appellant Richard Dunn was convicted by a King County jury on November 8, 2004, of kidnapping in the first degree, child

molestation in the first degree, and six counts of possession of depictions of minors engaged in sexually explicit conduct. CP 23, 29. The jury found by special verdict that the kidnapping and possession of depiction of minors had been committed with sexual motivation. CP 24. For purposes of this special verdict, the jury was instructed, with regard to the kidnapping in the first degree and possession of depictions of minors charges,

The State has the burden of proving the existence of an aggravating circumstance beyond a reasonable doubt. In order for you to find that there is an aggravating circumstance in this case, you must unanimously agree that the aggravating circumstance has been proved beyond a reasonable doubt . . . If you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the Special Verdict Form . . . “yes” as to that circumstance.

Supp. CP \_\_ (Sub No. 271) (Instructions No. 23, 25). The jury was not instructed that jury unanimity was not required for the jury to answer “no” to the Special Verdict Form. By contrast, with regard to the underlying substantive offenses, the jury was instructed in pertinent part:

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty . . . On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty[.]

Supp. CP \_\_\_ (Sub No. 273) (Instructions No. 7, 13).

D. ARGUMENT

THE ERRONEOUS UNANIMITY INSTRUCTION  
IMPROPERLY CONVEYED TO THE JURY THE FALSE  
IMPRESSION THEY NEEDED TO BE UNANIMOUS TO  
ANSWER "NO" TO THE SPECIAL VERDICT.

1. A special verdict instruction that communicates unanimity is required to answer "no" as well as "yes" is erroneous and not susceptible to harmless error analysis. In State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010), the Washington Supreme Court vacated a firearm enhancement because the instructions erroneously communicated that the jurors had to be unanimous to answer "no" to a special verdict, as only one juror need have a reasonable doubt in order for a special verdict not to be imposed. 169 Wn.2d at 146-47. Although grounded in common law, the opinion in Bashaw in fact suggested that the reason for the Court's holding derived from principles of due process.

The State noted that the jury had been polled to ensure the verdict was unanimous, and urged the Court to find the error harmless. Id. at 147. The Court held that this fact "misses the point" because the error "was the procedure by which unanimity would be inappropriately achieved." Id. at 147. The Court noted

that this error stemmed from the “flawed deliberative process” and therefore said it could not “say with any confidence” what would have occurred but for the faulty instruction. Id. at 147-48.

Similarly, the United States Supreme Court has held that an erroneous reasonable doubt instruction is a structural error that requires reversal of the conviction without resort to harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 279-81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); U.S. Const amends. VI; XIV. The Supreme Court held: “[t]o hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.” Id. at 279. The same is true with regard to an erroneous unanimity instruction, as that instruction vitiates all of the jury’s findings with regard to that instruction.

2. The special verdict forms here did not inform the jury that it could answer “no” if not unanimous, and, read in conjunction with the other instructions, conveyed that unanimity was required for a “no” answer. The State may claim in response that Bashaw does not control the outcome here, as in Bashaw the jury affirmatively was instructed, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” See State v. Bashaw,

144 Wn. App. 196, 201, 182 P.3d 451 (2008). Such an argument, however, is without merit.

Jury instructions must be read as a whole. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The adequacy of jury instructions is a question of law that is reviewed de novo. Id. at 626-27. As noted, with regard to the substantive offenses, the jury was instructed that an acquittal requires unanimity. Supp. CP \_\_\_ (Sub No. 273) (Instructions No. 7, 13). The jury was further told, “Since this is a criminal case, each of you must agree to return a verdict.” Supp. CP \_\_\_ (Sub No. 273) (Instruction No. 22). The instructions were consecutively numbered and reasonably construed as comprising in their entirety the law of the case.

The unanimity requirement does not apply in order for a special verdict to be answered in the negative, both as a matter of settled law and because of policy considerations. Bashaw, 149 Wn.2d at 147. Further, an error in the special verdict instruction requires vacation of the verdict so obtained and resentencing without regard to the special verdict. See id. at 146-47 (“Where . . . a defendant is already subject to a penalty for the underlying substantive offense, the prospect of an additional penalty is

strongly outweighed by the countervailing policies of judicial economy and finality”).

Here, the jury was affirmatively instructed that unanimity was required to answer “yes” to the special verdict. Supp. CP \_\_ (Sub No. 271) (Instructions No. 23, 25). The jury was not told that in order to answer “no,” they did not need to be unanimous. Further, the instructions read as a whole told the jury that (a) unanimity was required for acquittal; and (b) because this was a criminal case, unanimity was required to return a verdict. Supp. CP \_\_ (Sub No. 273) (Instructions No. 7, 13, 22). The error, therefore, is factually indistinguishable from the error that occurred in Bashaw.

Also as in Bashaw, it is impossible for this Court to speculate that the jury’s answer to the special verdict would have been the same if the error had not occurred. The “flawed deliberative process” prevents this Court from being able to “say with any consequence” what would have occurred if the jury had been properly instructed. 149 Wn.2d at 146-47.

3. The error requires vacation of the special verdict. “[A] nonunanimous special finding by a jury is a final decision by the jury that the State has not proved its case beyond a reasonable doubt.” Bashaw, 169 Wn.2d at 148. Here, the deficient special

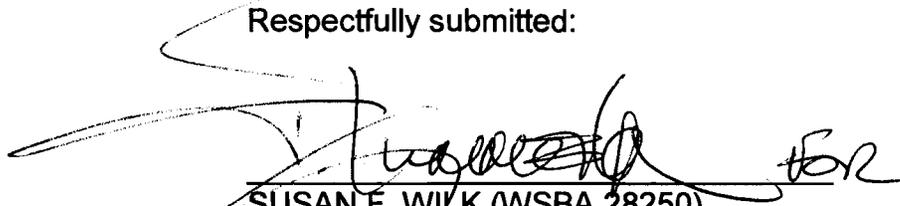
verdict form signaled that the jury had to be unanimous to answer “no.” The error requires vacation of the special verdict. Id.

E. CONCLUSION

The special verdict form in this case conveyed to the jury that they had to be unanimous to answer “no.” The sexual motivation findings obtained by these faulty means must be vacated.

DATED this 14th day of December, 2011.

Respectfully submitted:



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	)	
RICHARD DUNN,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14<sup>TH</sup> DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **SUPPLEMENTAL ASSIGNMENT OF ERROR AND SUPPORTING ARGUMENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN MCDONALD		
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**SIGNED** IN SEATTLE, WASHINGTON THIS 14<sup>TH</sup> DAY OF DECEMBER, 2011.

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